ISM SDN BHD v. QUEENSWAY NOMINEES (TEMPATAN) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[ORIGINATING SUMMONS NO: 24NCC-142-04-2015]
19 OCTOBER 2015

CIVIL PROCEDURE: *Mode of commencement – Originating summons – Application to convert originating summons to writ action – Nature of case involved conflicting and disputed facts – Whether insufficient to merely rely on affidavits – Allegations premised on oral evidence as opposed to documentary evidence – Whether appropriate for matter to be heard as writ action – Whether application for conversion premature – Whether conversion could be done and ordered by court at any stage of proceedings – Rules of Court 2012, O. 28 r.8 (1)*

The plaintiff filed an originating summons ('OS') against the defendants, premised on allegations of minority oppression under s. 181 of the Companies Act 1965. The plaintiff alleged that the defendants had misrepresented itself to the plaintiff, suppressed important documents, breached the fiduciary duties allegedly owed to the plaintiff and implemented an oppressive and unfair rights issue scheme to dilute the shareholding of the plaintiff. The defendants, in applying for determination by this court to convert the OS filed by the plaintiff to a writ action, submitted that (i) there were many disputed oral facts which made it impossible for the same to be heard judiciously through affidavit evidence; (ii) the application to cross-examine the deponent of the affidavits would only means waste of costs, resources, time and would complicate the OS proceedings; and (iii) if the witnesses relevant to prove the parties' claims and defendants were not willing to affirm affidavits, both parties would be severely prejudiced as there was no way to compel a witness to affirm affidavits in an OS proceeding. The plaintiff contested the application for conversion and argued that (i) the witness for the defendants would be able to affirm an affidavit for the hearing regarding the minority oppression in the OS, and therefore there was no real need for it to be tried as a writ action; (ii) the defendants must reply to the plaintiff's affidavit in support of the OS first before the present application could be heard; (iii) this was actually a delaying tactic by the defendants to stall the expeditious disposal of the case; and (iv) the defendants could always apply to cross-examine the deponents of the affidavits.

Held (granting application for conversion):

(1) The nature of the case on minority oppression, as alleged by the plaintiff, was one where it involved various conflicting facts or disputed facts that would be contended by both parties. These conflicting or disputed facts would mean that it was insufficient merely to rely on affidavit evidence alone to come to the determination whether there was

in fact minority oppression exercised on the plaintiff. The disputed facts would only mean that witnesses ought to be called not only to allow for their version of events to be narrated in court but more importantly for this court to make an assessment on the veracity of their oral testimony. It would be fair to all parties concerned including the plaintiff who opposed this application for the matter to be heard as a writ action in view of the need for witnesses to testify. (para 17)

(2) Even when a party is able to apply for cross-examination of the deponents of the affidavits of opposing parties, in this particular case, that was not an expedient way to determine the crux of the dispute on minority oppression. There may be arguments to oppose the application to cross-examine resulting in further time to be taken and wasted instead of having this determined by oral evidence from the outset. Further, there was no real substance for the plaintiff to argue that the present application was merely a strategy by the defendants to delay the hearing of the OS. Having this case heard by calling witnesses would dispose the issue of minority oppression in the OS faster, having regard to various disputed facts and the largely oral evidence as opposed to documentary evidence needed to prove the issue on minority oppression in the OS. It was prudent and appropriate that this OS be so converted. (paras 19, 23 & 25)

(3) Although the defendants had not replied to the affidavit of the plaintiff, it was not premature for the defendants to urge this court to convert the OS. Conversion can be done and ordered by the court at any stage of the proceedings. This court was empowered at this stage of the proceedings to convert the OS to a writ action. In light of the amendment in the present O. 28 r. 8(1) of the Rules of Court 2012 ('ROC'), the provision introduced an additional power to the court to also order for pleadings to be filed. With this additional 'power', this court could order for pleadings to be filed, and thus application for conversion into a writ could be made even if there was no affidavit in reply filed by the defendants. (paras 25 & 29)

(4) The OS needed to be converted to allow for the counterclaim of the defendants to be filed. If the OS remained unconverted, the counterclaim could not be filed because an OS were not pleadings unlike the counterclaim. Justice would not be met if the counterclaim could not be filed against the plaintiff merely because the OS could not be converted. Therefore, it would be more prudent, economical, faster and fairer for both the plaintiff and the defendants that the case on minority oppression as a whole be disposed of by way of a writ action where witnesses are called instead of merely proceeding by way of affidavits evidence as in the normal OS. (paras 16 & 35)

Case(s) referred to:

Cekal Berjasa Sdn Bhd v. Tenaga Nasional Bhd [2006] 8 CLJ 69 HC ***(refd)***

Malaysian International Merchant Bankers Bhd v. Highland Chocolate And Confectionery Sdn Bhd & Anor [1997] 1 CLJ 480 HC ***(refd)***

Ong Beng Cheng v. Chiu Wing Wa @ Chew Weng Wah & Ors [1993] 4 CLJ 591 HC ***(refd)***

Stamford College Berhad v. Iris Corporation Berhad [2013] 1 LNS 602 HC ***(refd)***

Yebet Saman & Ors v. Foong Kwai Long & Ors [2015] 2 CLJ 929 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181

Rules of Court 2012, O. 5 r. 2, O. 28 r. 8(1), O. 29 r. 8(1), O. 38 r. 2(2)

Rules of the High Court 1980, O. 28 r. 8(1)

For the plaintiff - Lim Kian Leong (Terence KM Chan, Tan Wei Wei & Shim Mong Seng with him); M/s Lim Kian Leong & Co

For the defendants - Celine Chelladurai (Saritha Devi Kirupalani with her); M/s Zaid Ibrahim & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Bakar Jais JC:

Introduction

[1] In this case the defendants' application for determination by this court is to convert the originating summons ('OS') filed by the plaintiff to a writ action. The OS is premised on allegation of minority oppression under s. 181 of the Companies Act 1965 on the plaintiff by the defendants.

Material Facts

[2] The facts only relevant for the purpose of this application are provided by the defendants. There is no reason to depart from these facts as I find that it serves the purpose why the application for the conversion of the OS into a writ action is being made now. It is to be observed, as this is now only a preliminary application regarding the mode upon the hearing of the plaintiff's case for minority oppression, the facts narrated here are not determinant of the substantive case but merely relevant for the current application. After all it should be noted this court is not making any decisions at this stage regarding the substantive case between the plaintiff and defendants on minority oppression.

[3] The plaintiff and the second defendant, entered into a joint venture arrangement ("JVA") which entailed the acquisition of individual plots of lands in the Imbi Area in KL (hereinafter referred to as the "Imbi Lands"), with a view to develop the same in whatever form the parties to the JVA thinks fit (the development of which is hereinafter referred to as the "Imbi Project"). To be noted this is merely an arrangement and not a formal written agreement.

[4] It was agreed that the cost of acquiring the Imbi Lands was to be borne by both parties in the proportionate ratio of 30% for plaintiff and 70% for second defendant, and that this will be reflected in the shareholding of the five companies which were used to acquire the Imbi Lands, namely, West Jaya Sdn Bhd ("West Jaya"), Mulpha Kluang Maritime Carriers Sdn Bhd ("Mulpha Kluang"), Queensway Nominees (Tempatan) Sdn Bhd ("QNT"), Queensway Nominees (Asing) Sdn Bhd ("QNA"), and Leisure Dotcom Sdn Bhd ("Leisure Dotcom") (hereinafter referred to as the joint venture arrangement companies ("JV companies").

[5] The costs of acquiring each individual plot of the Imbi Lands were broken up into 30% and 70% respectively. The 30% was then divided into a further 30% and 70%, where the plaintiff paid its 30% share in cash, and second defendant paid its 70% share. It was agreed between the parties that this will be known as the "cash portion" towards the acquisition of the Imbi Lands.

[6] The remaining 70% cost of acquiring the Imbi Lands, were also divided into 30% and 70%, with each party paying its respective shares. However, the plaintiff had insufficient funds to pay its 30% costs here, which caused the JV companies to take an intercompany loan from second defendant, known as the "loan portion" to enable the plaintiff to incrementally pay off its 30% of the loan portion under the JVA.

[7] A subsequent loan was taken by Caribbean Gateway Sdn Bhd ("CG") on behalf of the JV companies, from Malayan Banking Berhad ("Maybank"), in order to pay off the intercompany loan from second defendant. CG is a subsidiary of second defendant and the reason why CG took the loan from Maybank on behalf of the JV companies is because initially the plan was to transfer all the Imbi Lands to CG, so that one company owns all the Imbi Lands, as opposed to five different companies. The rationale here was that it would be easier for one company to deal with the Imbi Lands, whether for the purposes of a sale or development. However, this plan did not materialise.

[8] The JV companies are now debt ridden to second defendant as the same paid off the Maybank's loans and the corresponding interest, as and when the same became due, in order to prevent the Imbi Lands from being forfeited by Maybank. The reason why second defendant had to pay off the Maybank loans and its interest, is because the plaintiff had no funds to pay off its 30% share of the Maybank's loan and interest. Therefore, since the JV companies were high in debt due to the accumulation of loans and interests incurred in the acquisition of the Imbi Lands, a rights issue was implemented in three of the JV companies, QNA, QNT and Mulpha Kluang to increase its share capital, in order to pay off the intercompany loans taken from second defendant.

[9] In order to carry out a rights issue in West Jaya, a special resolution is required by virtue of West Jaya's Articles of Association to increase its share capital. The special resolution proposed during the Annual General Meeting of West Jaya on 5 March 2015 was not successfully passed, and therefore, the rights issue could not be implemented in West Jaya. Further, there was no necessity to carry out the rights issue in Leisure Dotcom, as there was no loan taken for Leisure Dotcom.

[10] The plaintiff filed the OS's against the defendants, alleging that the JVA only entailed the plaintiff to pay 30% of the cash portion, and the remaining 70% costs to acquire the Imbi Lands were to be paid off by second defendants solely, as the plaintiff's contribution was in kind, due to the alleged expertise of the shareholder of the plaintiff, one Ray Cheah and the work undertaken by him in the acquisition of the Imbi Lands and for the preliminary steps in the Imbi Project. The plaintiff further alleged that the defendants had misrepresented itself to the plaintiff for the past seven years, suppressed documents relating to the JV companies, breached the fiduciary duties allegedly owed to the plaintiff and had implemented an oppressive and unfair rights issue scheme to dilute the shareholding of the plaintiff.

Defendants' Arguments

[11] In summary the defendants argue that the OS initiated by the plaintiff although rightly filed, should be converted into a writ. Reliance is placed on O. 28 r. 8(1) of the Rules of Court 2012 ('ROC') for the conversion. The defendants also say O. 5 r. 2 of ROC allows for the conversion.

[12] The reasons why the OS should be converted to a writ action according to the defendants are;

(a) there are many disputed oral facts which makes it impossible for the same to be heard judiciously through affidavits evidence;

(b) application to cross examine the deponent of the affidavits would only mean costs, resources and time would be wasted on such an endeavour and would only cause delays and complicate the OS proceedings further and

(c) if the witnesses relevant to prove both parties claims and defence are not willing to affirm affidavits, both parties will be severely prejudiced, as there is no way to compel a witness to affirm affidavits in an OS proceeding. However, in a writ action, the attendance of the relevant witnesses can be compelled *via* subpoenas.

Plaintiff's Arguments

[13] Contesting the application for conversion, the plaintiff in gist argued that;

(a) the witness for the defendants would be able to affirm an affidavit for the hearing regarding the minority oppression in the OS, therefore there is no real need for it to be tried as a writ action;

(b) the defendants must reply to the plaintiff's affidavit in support of the OS first before this application could be heard;

(c) this is actually a delaying tactic by the defendants to stall the expeditious disposal of the case and

(d) the defendants could always apply to cross-examine the deponents of the affidavits.

Court's Findings

[14] There is no dispute that O. 28 r. 8(1) ROC allows for the conversion if this court agrees with the contention of the defendants. This provision states:

> Where, in the case of a cause or matter begun by originating summons, *it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered* or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof. (emphasis added)

[15] Likewise O. 5 r. 2 ROC also provides for such conversion where it states:

> Proceedings in which a substantial dispute of fact is likely to arise shall be begun by writ.

[16] Having noted the plaintiff's contention in respect of the minority oppression for the OS proper, I have little doubt that it would be more prudent, economical, faster and fairer for both the plaintiff and the defendants that the case on minority oppression as a whole be disposed of by way of a writ action where witnesses are called instead of merely proceeding by way of affidavits evidence as in the normal OS. I state my reasons for saying so in the succeeding paragraphs below.

[17] The nature of the case on minority oppression as alleged by the plaintiff is one where it will involve various conflicting facts or disputed facts that will be contended by both parties. These disputed facts include the question on what is the term of the JVA on shareholding since this JVA is verbal and not written. Also what is the position with regard to the loan and the charging of the relevant lands. These conflicting or disputed facts would mean that it is insufficient merely to rely on affidavits evidence alone to come to the determination whether there is in fact minority oppression exercised on the plaintiff. The disputed facts would only mean that witnesses ought to be called not only to allow for their version of events to be narrated in court but more importantly for this court to make an assessment on the veracity of their oral testimony. There is nothing better than this court being able to have the opportunity to look at the demeanour of the witnesses before judging the truth of what had been testified in open court. This of course cannot be done if the case is proceeded based merely on affidavits evidence.

It is also to say the least more prudent and fairer to all parties concerned including the plaintiff who opposed this application for the matter to be heard as a writ action in view of the need for witnesses to testify. Of course this can only apply if there are various conflicting or disputed facts. It cannot apply if there are no conflicting or disputed facts on any major issues. The OS should remain to be tried based on only affidavits evidence if there are not many conflicting facts but this is not the case here.

[18] In the Court of Appeal's case of *Yebet Saman & Ors v. Foong Kwai Long & Ors* [2015] 2 CLJ 929, the court had ordered the matter be remitted to the High Court in order for the same to be heard as a trial, and it was directed that the OS and affidavits be treated as pleadings. Prasad Abraham JCA, held that:

> The various affidavits filed contain issues of fact that need to be resolved by *viva voce* evidence and the learned judge should have converted this matter to a writ and justice could have been better served. It is our view this matter should have been disposed of by way of oral evidence...

[19] Also it must be considered that even when a party is able to apply for cross-examination of the deponents of the affidavits of opposing parties, in this particular case that is not an expedient way to determine the crux of the dispute on minority oppression. If cross-examination is contemplated, parties will then have to apply and in all likelihood there may be arguments to oppose the application to cross-examine resulting in further time be taken and wasted instead of having this determined by oral evidence from the outset. This is not to mention the possibility of appeals against that decision to allow for cross-examination on any particular deponent of the affidavit. Thus, this is further reason to say that the conversion applied by the defendant ought to be allowed.

[20] Apart from that, this court is of the view there is a great possibility that third parties would have to be called in to determine the issue on minority oppression. These third parties cannot be compelled to affirm an affidavit if this matter is allowed to proceed only on affidavits evidence. However they have no options if this case proceeded as a writ action in open court for witnesses to testify as they will be obliged to attend court as they are always open to be subpoenaed.

[21] I am of the findings too that the allegation on minority oppression alleged by the plaintiff is also premised on oral evidence as opposed to pure documentary evidence. Since it is not largely premised on documentary evidence but also on direct oral evidence, I am of the view that this allegation be best resolved and determined by way of a writ action instead of by way of OS. Had it been substantially based on the documentary evidence *per se*, only then would I agree that the hearing should be based on affidavits alone. Even then the documentary evidence would be voluminous, including the valuation reports necessitating oral evidence to be given and cross-examination be made instead of just affidavits evidence.

[22] Also to be considered is the fact that the events concerning the case of the plaintiff against the defendants spanned roughly seven years suggesting the need to carefully examine these events that occurred thus rendering it best that oral evidence be heard instead of just affidavits evidence. Further these events almost entirely involved not documentary evidence but verbal exchanges between the parties indicating it would be more appropriate and fitting that this court should hear oral evidence as opposed to affidavits evidence. Although it cannot be denied that affidavits evidence would have achieved the same purpose, there should be no dispute that hearing oral evidence would do no harm to all parties in this case. After all it is only fair to suggest that under normal circumstances the same past events are perceived to happen differently to different set of people. That is precisely the more reason to allow for oral testimony to better gauge, assess and evaluate what actually happened with regard to these past events.

[23] I have also considered there is no real substance for the plaintiff to argue that the present application is merely a strategy by the defendants to delay the hearing of the OS to its conclusion. In fact I am of the contrary view that having this case heard by calling witnesses would dispose the issue of minority oppression in the OS faster, having regard to various disputed facts and the largely oral evidence as opposed to documentary evidence needed to prove the issue on minority oppression in the OS. Proceeding with the OS and having to apply for cross-examination of the deponents of the affidavits would mean taking a longer route in concluding the case instead of having witnesses ready to testify by oral testimony in open court. In this regard it is not inappropriate to say that actually the plaintiff should be appreciative that this application has the effect of expediting the hearing on the issue of minority oppression as a whole, which is after all initiated and brought to this court by the plaintiff itself.

[24] I am also of the opinion that it would be more prudent and appropriate to have the oral hearing as allowing for the case to continue on the OS will only mean there could be several affidavits of just one deponent alone but if this case is to proceed by way of writ, than there is no requirement to file these affidavits. What would be needed is to file probably just one witness statement for the each witness of the plaintiff and defendants without the need to reply affidavits back and forth.

[25] I have also considered the fact that this is a case of minority oppression under s. 181 of the Companies Act 1965 which requires an OS to be filed. I have considered the filing of the case by the plaintiff by OS is correctly done and this was conceded by the defendants. However based on the reasons that have been highlighted, I do not think that the OS filed cannot be converted to a writ action. As I had explained, based on the facts of this particular case, it is only prudent and appropriate that this OS be so converted. In this regard I have also considered the case of *Malaysian International Merchant Bankers Bhd v. Highland Chocolate And Confectionery Sdn Bhd & Anor* [1997] 1 CLJ 480; [1997] 1 MLJ 102 cited by the plaintiff on the proposition that since

the defendants had not replied to the affidavit of the plaintiff, it is premature and not open for the defendants to urge this court to convert the OS. In this regard, I have also taken note of the provision of O. 28 r. 8(1) of the Rules of High Court 1980 (RHC), (which is substantially similar to the present O. 28 r. 8(1) ROC) discussed in that case and I am of the view even in that provision, it is stated that the conversion can be done and ordered by the court at any stage of the proceedings. Thus I am empowered at any stage of the proceedings to convert the OS to a writ action and likewise I am ordering the same at this stage of the proceeding between the plaintiff and defendants without the need to wait for the defendant to reply to the affidavit of the plaintiff.

[26] There are further findings regarding the previous O. 28 r. 8 of RHC as decided in *Malaysian International Merchant Bankers Bhd* (*supra*). This provision states:

> Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as it the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun **and may, in particular, order that any affidavit shall stand as pleadings**, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.
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> (emphasis added)

[27] The above provision provides the court with the power to order affidavits to stands as pleadings. This effectively means that there must be an affidavit in support and affidavit in reply filed into court prior to the commencement of a conversion application. Otherwise the court cannot order that the affidavits filed to stand as pleadings. In other words, the court did not have the authority to order the further filing of pleadings.

[28] Therefore, the case of *Malaysian International Merchant Bankers Bhd* (*supra*) was a correct decision at the time it was made, in light of the court's limited jurisdiction under RHC 1980. Briefly, this case involved a conversion application filed by the defendant to convert the plaintiff's originating summons action into a writ action and the defendant here had filed this application without having filed an affidavit in reply to the plaintiff's affidavit in support. The judge held that a conversion application under O. 28 r. 8 RHC then can only be commenced once both parties have filed their affidavits, as only then can the judge order the affidavits filed to stand as pleadings, and rightfully dismissed the conversion application.

[29] However, the above position is no longer applicable now for the present case in light of the amendment in the present O. 28 r. 8(1) ROC as narrated earlier. The present provision now introduces an additional power to the court to allow the courts to also order for pleadings to be filed (see the provision narrated earlier). This means, with this additional "power" this

court can now order for pleadings to be filed, and thus application for conversion into a writ, can be made even if there is no affidavit in reply filed by the defendants. Hence, the defendants can rely on this amendment when they filed the conversion application and prayed for directions to file its statement of defence and counterclaim, which is now empowered to be done in light of O. 28 r. 8 (1) ROC.

[30] Further, O. 29 r. 8(1) ROC also states "it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ." The word "appears" has been defined in the case of *Stamford College Berhad v. Iris Corporation Berhad* [2013] 1 LNS 602; [2014] 8 MLJ 178 as follows:

> As noted earlier in this judgment, the application for Security of Costs is made pursuant to s. 351(1) of the Act which reads;
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> > Where a company is Plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
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> This Court noted the word "appears" in the section and would recognise that the word "appears" denotes a lesser degree of probability than normally required in terms of proving a particular assertion.
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> The burden of proof on the part of the Defendant to say that the Plaintiff must provide the security is lessen in view of that word "appears". '...appears by credible testimony...' cannot be the same as '...by credible testimony...' Needless to say the word 'appears' is inserted by the legislature not for it to be superfluous or as a surplusage, there must be a reason for the addition of that word.
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> Therefore this Court would rule that 'appears' in the context of that section means evidence lesser than credible testimony.
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> This view is not unsupported as the Court of Appeal in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa (M) Securities Bhd and Another Appeal* [2012] 8 CLJ 678; [2013] 1 MLJ 158 quoted with approval the Supreme Court of India's decision in *Pyare lal Bhargava v. State of Rajasthan* AIR [1963] SC 1094 where the relevant passage reads;
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> > The crucial word in the first ingredient is the expression 'appears'. The appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof.

[31] Likewise the word "appears" at O. 28 r. 8(1) ROC was also added for a reason, mainly to place a lower burden of proof for parties seeking to convert an OS into a writ action. Therefore I agree with the contention of the defendants here that they do not have to file affidavits in reply to the plaintiff's affidavit in support of the OS to prove to this court the disputed

affidavit evidence. It is therefore incorrect to say that it is immature at this stage for the defendants to make the application. I agree that it is sufficient the defendants here have laid out disputed affidavit evidence and the disputed facts in its affidavits in support of the conversion application.

[32] I have also taken note of O. 38 r. 2(2) of the ROC that states:

> In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[33] I have also considered the contention of the plaintiff based on the above provision since this case is commenced by OS, there is a need for the evidence to be adduced by affidavits.

[34] With respect, I am of the opinion this provision cannot stand alone but must be read with O. 28 r. 8(1) ROC as narrated earlier, paving the way for the conversion of the OS into a writ action. In fact O. 38 r. 2(2) ROC itself as narrated clearly contains the words "…unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs…" Therefore following this provision itself, on two grounds the conversion can be made. First by the provision of O. 28 r. 8(1) of the ROC which allows such conversion and second by the order of this court itself.

[35] The OS also needs to be converted to allow for the counterclaim of the defendants. The OS if it remains unconverted would mean the counterclaim cannot be filed because an OS is not pleading unlike the counterclaim. In *Ong Beng Cheng v. Chiu Wing Wa @ Chew Weng Wah & Ors* [1993] 4 CLJ 591; [1993] MLJU 166 Selventhirananthan J (as he then was) decided that OS is not pleading while in the case of *Cekal Berjasa Sdn Bhd v. Tenaga Nasional Bhd* [2006] 8 CLJ 69; [2006] 4 MLJ 284 Malik Ishak J (as he then was) explained that a counterclaim is a type of pleading that includes statement of claim and statement of defence.

[36] Following from the above, it would not be fair and this court thinks it is not meeting justice if the counterclaim cannot be filed against the plaintiff merely because the OS cannot be converted. In fact because such conversion can be applied for, the application for conversion ought to be granted here so as to allow the counterclaim to be filed and litigated.

A

Conclusion

[37] In this case there are several reasons as explained earlier for the conversion of the OS to a writ action to be allowed. The finding that there would be disputed facts on major issues mean that it is just and appropriate for witnesses to testify instead of only relying on the affidavits evidence. Relying just on affidavits evidence is not a prudent and appropriate way to hear the substantive matter of this case on minority oppression.

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